Rosenwinkel v. BennettUtah App.,1998.Only the Westlaw citation is currently available.
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

Hans ROSENWINKEL, Plaintiff and Appellant,

v.

John BENNETT, Defendant and Appellee.

No. 971521-CA.

Nov. 27, 1998.

Elizabeth T. Dunning and Lloyd R. Jones, Salt Lake City, for appellant.
James S. Lowrie and James E. Magleby, Salt Lake City, for appellee.

Before WILKINS, BILLINGS, and JACKSON, JJ.

MEMORANDUM DECISION (Not for Official Publication)

BILLINGS.

***1** Appellant Hans Rosenwinkel appeals from a judgment dismissing his protective order, and awarding appellee John Bennett rent and attorney fees. We affirm in part and reverse and remand in part.

Because the procedural history of this case is confusing, we briefly point out relevant dates and occurrences. On February 7, 1997, Rosenwinkel sought and obtained an ex parte protective order against Bennett. Bennett filed a verified answer, a Motion for Dissolution of the Protective Order including a request for return of rent, security deposit, and attorney fees, and a notice of hearing for February 24, 1997. On the morning of the 24th, Bennett appeared at 8:30 am before the commissioner, who noted Rosenwinkel's absence, dissolved the protective order, and ordered that Bennett should receive a refund of rents already paid. An hour later, Rosenwinkel appeared with a copy of the protective order that stated the hearing time was set for 9:30 am. The commissioner vacated the earlier order, continued the hearing to March 10, 1997, and reinstated the protective order until that time.

On March 10, 1997, both Rosenwinkel and Bennett appeared before the commissioner. Bennett's counsel argued that the protective order should be dissolved. The commissioner ruled that the Cohabitant Abuse Act, Utah Code Ann. 30-6-1 to 14 (Supp.1998), was not intended to cover a cotenant relationship, and dismissed the matter stating "*[t]he Court will enter it's own order*." On April 14, 1997, Bennett's counsel submitted a proposed order vacating the restraining order and granting Bennett a rent refund, as well as granting Bennett attorney fees. The commissioner approved the order on April 23, 1997, and the court issued a judgment based on that order on June 25, 1997. FN1 On July 23, 1997, Rosenwinkel filed a Notice of Appeal with this court, as well as a Motion for Relief From Judgment under Rule 60(b) of the Utah Rules of Civil Procedure.

> FN1. Though Bennett mailed copies of the proposed order and judgment to Rosenwinkel, he claims to have moved prior to April 1997, and thus to have never received either document.

Bennett argues, as a preliminary matter, that Rosenwinkel has failed to preserve the arguments he raises on appeal. To the contrary, Rosenwinkel filed his Notice of Appeal and 60(b) Motion as soon as he learned of what he claims were errors in the judgment.

Next, Rosenwinkel asserts that the judgment does not comport with the proceedings in the trial court. "[T]he statements and observations of the trial court in discussing the evidence do not bind him, nor do they limit his prerogative of finally making up his mind[;] they are superseded by the formal written findings and judgment." *Newton v. State Road Comm'n*, 23 Utah 2d 350, 353, 463 P.2d 565, 567 (Utah 1970). *See State v. Wade*, 572 P.2d 398, 399 n. 3 (Utah 1977) (same). Thus, although the commissioner's oral ruling was simply to dismiss the matter, the court was free to incorporate an award of back rent and attorney fees to Bennett in its final written order. FN2

> FN2. We note Rosenwinkel's 60(b) motion is the proper forum for Rosenwinkel to demonstrate that the court's order does not comport with the March 10 proceedings.

Finally, Rosenwinkel argues that the award of attorney fees was improper because the court failed to make the requisite findings for such an award. We agree. Utah Code Ann. 78-27-56(1) (1996) states: "In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith."

***2** Under the plain language of [section 78-27-56(1)], attorney fees are appropriately awarded only if the trial court determines that three requirements are met: (1) the party seeking fees prevailed; (2) the claim or defense asserted by the opposing party was meritless; and (3) that claim or defense was asserted in bad faith. *With regards to each these elements, the trial court must make specific findings.*

Chipman v. Miller, 934 P.2d 1158, 1161 (Utah Ct.App.1997) (emphasis added) (citing *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, 1068 (Utah 1991)). Here, the court erred in awarding attorney fees as the court did not make any of the necessary factual findings noted above. We therefore affirm the order as far as it vacates the restraining order and grants back rent, but reverse and remand the portion of the judgment awarding attorney fees for the entry of the required findings and based upon those findings an appropriate order.

JACKSON, J., and WILKINS, A.P.J., concur.
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